SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

AVAAZ FOUNDATION, Petitioner, -against- MONSANTO COMPANY, Respondent.	Index No.

MEMORANDUM OF LAW IN SUPPORT OF PETITION TO QUASH SUBPOENA

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Petitioner Avaaz Foundation ("Avaaz") submits this memorandum of law in support of its petition to quash, or in the alternative modify, the January 26, 2018 subpoena (the "Subpoena") issued by Respondent Monsanto Company ("Monsanto") and for a protective order.

PRELIMINARY STATEMENT

Avaaz, a global civic organization with more than 46 million members, has been a thorn in Monsanto's side for years. By mobilizing its members, organizing events, circulating and submitting petitions and letters, meeting with public officials, and engaging in political advocacy in many different forms, Avaaz has campaigned for policies and reforms that protect the environment and public health and enable sustainable development. Some of these efforts may affect industries and firms like Monsanto, and many of them have been successful. Avaaz's political advocacy helped to block Monsanto's construction of a seed plant in Argentina that was opposed by the local community, helped to persuade regulators in Arkansas to temporarily ban a new Monsanto pesticide, and successfully opposed a Guatemalan law that gave Monsanto special rights to patent crops. Most relevant here, Avaaz helped to convince the European Union not to renew its approval of glyphosate, a weed-killing chemical that Monsanto markets and sells under the name Roundup®, for the maximum period of 15 years—a stunning reversal for one of the world's largest corporations.

All of Avaaz's campaigning is a lawful expression of civic and political engagement. Corporations like Monsanto are creatures of public law, granted their status by the public and regulated by governments held accountable to the public. Avaaz's members petition these governments to take actions that the members believe are in their interests and the public's. Like many politically engaged citizens, they often do so in uphill fights against better-resourced and more powerful companies and institutions. Their willingness and ability to do so is at the very core of democratic self-government.

That it is why it is so troubling—and unlawful—that Monsanto has responded to this history of advocacy with a subpoena designed to harass and intimidate Avaaz and to win access to the organization's most confidential and politically-sensitive documents. Calling for the immediate production of virtually every Monsanto-related document in Avaaz's possession, the Subpoena is intended to pry as deeply as possible into Avaaz's inner workings. The resulting impact—or "chill"—on Avaaz's millions of members and more than 100 staff members in 23 countries is palpable, and documented below.

Monsanto's Subpoena is as overbroad, burdensome, and baseless as it is harassing. Directed at a global organization that communicates almost exclusively by electronic means, the Subpoena calls for the production of literally millions of documents: everything from Avaaz's internal strategy memos and deliberations on how it intends to oppose Monsanto's practices, to its member communications, correspondence with issue experts and scientists, confidential communications with sources, drafts of its advocacy letters and petitions, and the donation records of millions of its members. Compliance would require thousands of person-hours and at least hundreds of thousands of dollars in costs—costs that would deeply affect Avaaz's ability to fulfil its core mission of advocacy and civic engagement. The Subpoena is a hostile "fishing expedition"—carried out with a dragnet.

To say that the Subpoena's evidentiary basis rests on the thinnest of reeds would give Monsanto too much credit. There is no reed. Monsanto claims that the Subpoena will assist its defense of a Missouri action brought by Ronald Peterson and Scott Hall, two Illinois agricultural workers who allege that their use of Roundup® caused them to develop non-Hodgkin's lymphoma. But Avaaz is an advocacy organization that calls decision makers' attention to the concerns of the public, not a decision maker itself. Its advocacy efforts around glyphosate,

including those referenced in the Subpoena, occurred *after* Peterson and Hall had already stopped using Roundup®, and *after* the two men had already been diagnosed with cancer. And Avaaz is a civic organization, not a scientific or medical one. It has no knowledge of Peterson and Hall's medical condition, it has never communicated with them, and its after-the-fact political advocacy against glyphosate is in no way relevant to Monsanto's defense.

The constitutional concerns raised by this Subpoena are obvious and grave. Forcing Avaaz to give Monsanto unfettered access to its work product, its internal communications, and its member and donor lists would undermine its political efficacy, discourage its members' exercise of their associational rights, and chill its speech. Turning Avaaz's records over to Monsanto would be like turning the records of the Brady Campaign to Prevent Gun Violence over to Smith & Wesson. Under settled constitutional law, a subpoena for such materials must be justified by a "compelling need." Monsanto's paper-thin rationale does not come close to satisfying this high burden.

Notably, this is not the first time Monsanto has tried to use third-party discovery to extract documents from persons who believe its products may be harmful—and, if this petition is granted, it would not be the first time that a court rebuffed such an effort. Monsanto is a defendant in dozens of Roundup®-related personal injury cases that have been consolidated in a federal multidistrict litigation (MDL) in California. In the MDL, the presiding federal judge quashed Monsanto's subpoena to a scientist who helped draft a 2015 report concluding that glyphosate was probably carcinogenic to humans. There, the court held that the materials underlying the 2015 report were "not central enough to the litigation to justify the burden." Pretrial Order No. 15, *In re Roundup Prods. Liab. Litig.*, MDL No. 2471 (N.D. Cal. Mar. 13, 2017). That same 2015 report is what triggered Avaaz's advocacy around glyphosate in the first

place. If documents in the possession of a scientist who *participated* in the key scientific report do not justify a subpoena, then documents in the possession of a civic organization that later engaged in *an advocacy campaign* based, in part, upon that report surely do not either.

Upon review, one thing is clear: the Subpoena is *not* about Monsanto's defense in the *Peterson* case. It is about payback. Because the Subpoena intrudes on the core protected First Amendment activity of Avaaz and its members without justification, seeks documents that are utterly irrelevant to the underlying personal injury case, and imposes an undue logistical and financial burden on Avaaz, the Subpoena should be quashed in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

Avaaz and Its Work on Monsanto

Avaaz is a global civic movement with more than 46 million members worldwide and a professional staff of more than 100 people in 23 countries. Affidavit of Emma Ruby-Sachs ("Ruby-Sachs Aff.") ¶ 4. Avaaz conducts advocacy campaigns that involve organizing events, raising awareness through the media, petitioning, raising money, helping members contact government officials, meeting with public officials, and taking legal action. *Id.* ¶ 5. The organization has no fixed ideology, geographic focus, or set of issues. *Id.* ¶ 6. Its core mission is a democratic one: to hold governments accountable to people. *See id.* Avaaz's priorities are set by its members. *Id.* ¶ 7. Communication across time zones with members, within the professional staff, and with collaborators is critical to Avaaz's fast-paced, member-driven work on a broad range of constantly changing issues. *Id.* ¶¶ 9-10. Avaaz conducts issue-specific fundraising to support many of its campaigns. *Id.* ¶ 12.

A number of Avaaz's recent campaigns have focused on Monsanto. *Id.* ¶ 14. For example, from about 2010 to 2012, Avaaz campaigned for a moratorium on the introduction of genetically modified crops into the European Union (EU) until an independent body could study

adequately their scientific and ethical impact. *Id.* ¶ 15. In 2013, Avaaz urged EU member states to close loopholes in European patent treaties that let Monsanto patent common plant varieties. *Id.* ¶ 16. In 2014, Avaaz campaigned successfully against Guatemala's "Monsanto Law," which gave Monsanto special rights to claim intellectual property protections for seeds. *Id.* ¶ 18. From 2013 to 2015, Avaaz helped to lead a successful effort to block Monsanto from building a seed plant in Córdoba, Argentina, that faced widespread local opposition. *Id.* ¶ 19. Avaaz is currently conducting an ongoing global campaign against the proposed merger between Monsanto and Bayer, which raises important questions of corporate power, food sustainability and integrity, and environmental protection. *See id.* ¶ 20. And in 2017, Avaaz organized its members to encourage the Arkansas Plant Board to temporarily ban the use of dicamba, a newly reformulated Monsanto herbicide. *Id.* ¶ 21.

The Glyphosate Controversy and Campaign

In March 2015, the World Health Organization's International Agency for Research on Cancer (IARC) issued a monograph concluding that glyphosate is "probably carcinogenic to humans" (the "IARC Report"). The IARC Report was not a scientific study of its own; it was an analysis of "studies that were previously conducted on the carcinogenicity of glyphosate." Affirmation of Andrew G. Celli, Jr. ("Celli Aff.") Ex. C at 2. Avaaz had no role whatsoever in the scientific studies on which the IARC Report was based, in the deliberations about what conclusions the IARC Report should draw, or in the drafting of IARC Report. *See* Ruby-Sachs Aff. ¶ 24. It did not even know about the IARC Report until it was publicly released, and it had not done any work on glyphosate until that point. *See id*.

After the release of the IARC Report, Avaaz began a campaign around glyphosate, the key ingredient in the Monsanto product known as Roundup®. *Id.* ¶ 25. The principal focus of

this campaign was to persuade the EU not to grant a 15-year renewal of its approval of glyphosate as an active substance for use in Europe. *Id.* Consistent with the "precautionary principle" of EU law, which takes possible but unproven health effects into account in regulating products, Avaaz called for the EU to suspend the glyphosate license until additional scientific testing could be done to prove it was safe. *See id.* ¶¶ 15, 25, 29. Along with other groups, Avaaz later organized a European Citizens' Initiative—a procedure allowing one million European citizens to petition for new legislation—advocating that Europe ban glyphosate, reform its pesticide approval system, and set targets for a phase-out. *Id.* ¶ 25, 33.

In support of its glyphosate campaign, Avaaz met with EU officials and members of the European Parliament, as well as the governments of key EU member states. *See id.* ¶¶ 29, 33-35. It organized events to raise awareness through the media, helped its members contact their own national governments and EU officials, and communicated with partner organizations. *See id.* ¶¶ 33-39. In the United States, Avaaz conducted advocacy about glyphosate before the Environmental Protection Agency (EPA), including by making a presentation to a scientific advisory panel on insecticides in December 2016. *Id.* ¶ 30-31. Virtually the entire staff of Avaaz worked on the glyphosate campaign at one point or another. *Id.* ¶¶ 41, 59.

The outcome of the glyphosate campaign in Europe was ultimately favorable. The European Parliament passed a resolution urging that glyphosate be phased out in five years, and EU member states ultimately decided to renew the approval of glyphosate for only five years—less than the 15 years that is typical, and less than the 10 years that had been proposed as a compromise. *See id.* ¶ 40.

The* Peterson *Case

On April 18, 2016, Ronald Peterson and Jeff Hall, both residents of Illinois, sued Monsanto and its advertising agent in the Circuit Court of the City of St. Louis, Missouri, where Monsanto is headquartered. *See* Celli Aff. Ex. B. Peterson, a lifelong farmer, used Roundup® extensively from 1990 through 2015 on his crops, which included a glyphosate-resistant "Roundup Ready®" soybean variant developed by Monsanto. *Id.* ¶ 78. Hall, a professional landscaper, used Roundup® almost daily during the growing season for five years. *Id.* ¶ 79. Both men suffer from non-Hodgkin's lymphoma. *Id.* ¶¶ 78-79. Peterson was diagnosed in May 2015; Hall was diagnosed in 2013. *Id.* Their lawsuit alleges, in substance, that Roundup® is an unreasonably dangerous product that caused their cancer, that Monsanto failed to warn them of the danger, and that Monsanto was negligent in disregarding health risks in manufacturing, marketing, and selling Roundup®. *See id.* ¶¶ 80-134.

On January 26, 2018, after obtaining a commission from the Missouri Circuit Court, Monsanto served Avaaz with the Subpoena in the *Peterson* case pursuant to the Uniform Interstate Depositions and Discovery Act (UIDDA) and CPLR 3119. Celli Aff. Ex. A. While the Subpoena purports to request ten enumerated categories of documents, read as a whole, it commands the production of virtually *every* Monsanto-related document in Avaaz's possession—likely millions of documents in all (collectively, the "Responsive Materials").

The Subpoena

The Subpoena contains ten requests for documents. The first four refer to specific advocacy efforts undertaken by Avaaz: a 2015 meeting with EU regulatory staff and three letters sent to EU institutions in April 2016, July 2016, and October 2017. *See* Celli Aff. Ex. A at 8. All of these events occurred after Peterson and Hall had stopped using Roundup® and had

already been diagnosed with cancer. *See* Celli Aff. Ex. B ¶¶ 78-79. As explained in the Affidavit of Avaaz Deputy Director Emma Ruby-Sachs, by calling for "[a]ll documents and communications related to" these four events, the Subpoena encompasses an extremely broad range of material. This material includes, but is not limited to: drafts and comments on drafts; talking points for the 2015 meeting; internal deliberations and deliberations with partner organizations and experts about what to say and what to do; internal strategic discussion of Avaaz's campaign objectives and their relationship to these discrete events; communications with the press about these events; emails to members about these events; and members' responses thereto, including records of donations made in response to these appeals. Ruby-Sachs Aff. ¶¶ 49a-g.

The Subpoena's remaining six requests all have the same general formulation. Each calls for all of a certain kind of document "regarding glyphosate, glyphosate-containing herbicides (including, but not limited to Roundup-branded herbicides), . . . Monsanto, any other manufacturer of glyphosate-based herbicides, or IARC." Celli Aff. Ex. A at 8-9. The key word is "or"—glyphosate *or* Monsanto—which sweeps in virtually every sensitive document about all of the Monsanto-related work Avaaz has ever done.

Accordingly, the Subpoena's fifth request calls for "[a]ll documents . . . relating to public relations and lobbying in the United States and/or Europe" regarding glyphosate *or* Monsanto. *Id.* at 9. The sixth demands "[a]ll communications" with public relations or advertising firms regarding glyphosate *or* Monsanto. *Id.* The seventh calls for "[a]ll communications" with "the United States government, a foreign government[] or any non-governmental agency" about glyphosate *or* Monsanto. *Id.* The eighth seeks any communications regarding glyphosate *or* Monsanto with any lawyers who have ever sued Monsanto. The ninth demands "[a]ll documents

regarding any trips, visits, or contact made . . . with the United States government, a foreign government, or any non-governmental agency" regarding glyphosate *or* Monsanto. *Id.* And the tenth seeks all documents relating to speaking engagements, presentations, or conferences regarding glyphosate *or* Monsanto. *Id.*

As Ms. Ruby-Sachs explains, nearly *all* of Avaaz's Monsanto-related documents and communications will fall into one of these categories. Conducting public relations, contacting government officials, communicating with nongovernmental organizations, and speaking at events are precisely what Avaaz *does*—they are civic advocacy. *See* Ruby-Sachs Aff. ¶ 52. Thus, documents responsive to the Subpoena's fifth through tenth requests include, but are not limited to: petitions signed by Avaaz members; members' individual messages to campaign targets through the Avaaz website's "Send a Message" tool; campaigns started by members on Avaaz's Community Petitions website; records of member donations in response to Monsanto-related appeals; notes of Avaaz campaign staff meetings; internal campaign strategy deliberations; research conducted by Avaaz staff; and more. *Id.* ¶¶ 54a-u. These documents will pertain not only to glyphosate, but to all of Avaaz's Monsanto-related campaigns, ranging from a seed plant in Argentina to intellectual property in Guatemala to dicamba in Arkansas. *Id.* ¶ 53.

On February 16, 2018, Avaaz sent Monsanto a three-page letter objecting to the subpoena, explaining its constitutional and structural defects, and requesting its withdrawal. Celli Aff. Ex. D; *see* CPLR 2304. Monsanto responded the same day with a one-paragraph letter, asserting without analysis that it disagreed with Avaaz's objections. Celli Aff. Ex. E.

ARGUMENT

New York law governs Avaaz's motion to quash a subpoena issued under the UIDDA. *See Hyatt v. State Franchise Tax Bd.*, 105 A.D.3d 186, 204-05 (2d Dep't 2013).

The Court should quash the subpoena for three basic reasons. *First*, forcing Avaaz to produce the Responsive Materials would violate the United States Constitution, as well as the New York State Constitution and Shield Law. *Second*, the Responsive Materials are utterly irrelevant to the *Peterson* case. *Third*, gathering and producing the Responsive Materials would impose an undue burden on Avaaz.

I. THE FIRST AMENDMENT SHIELDS THE RESPONSIVE MATERIALS FROM DISCLOSURE TO MONSANTO

"Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . a restraint on freedom of association." *Id.* at 462.

For this reason, "[t]he [U.S.] Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation." *AFL-CIO v. FEC*, 333 F.3d 168, 176 (D.C. Cir. 2003). Thus, a person or organization served with a discovery request, interrogatory, or subpoena that would burden its expressive rights can assert a First Amendment privilege against compelled disclosure. *See, e.g.*, *N.Y. State Nat'l Org. for Women (NOW) v. Terry*, 886 F.2d 1339, 1355 (2d Cir. 1989); *In re Motor Fuel Temp. Sales Practices Litig.*, 641 F.3d 470, 489-91 (10th Cir. 2011); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1159-61 (9th Cir. 2010).

The applicable standard is clear. First, the party asserting the First Amendment privilege must make a "*prima facie* showing that disclosure would infringe its First Amendment rights." *NOW*, 886 F.2d at 1355. "Mindful of the crucial place speech and associational rights occupy under our constitution, . . . in making out a *prima facie* case of harm *the burden is light*." *Id.* (emphasis added); *see also Schiller v. City of New York*, No. 04-CV-7922, 2006 WL 3592547, at

*6 (S.D.N.Y. Dec. 7, 2006) ("[O]rganizations resisting discovery on freedom of association grounds bear a minimal burden of proof."). As explained more fully below, this light burden can be satisfied through even a minimal evidentiary showing and common-sense inferences drawn therefrom, or even through allegations in a petition in a special proceeding like this one. *See, e.g.*, *Evergreen Ass'n v. Schneiderman*, 153 A.D.3d 87, 94, 99-100 (2d Dep't 2017); *AFL-CIO*, 333 F.3d at 176-77; *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 954 F. Supp. 2d 127, 141 (E.D.N.Y. 2013).

Once a *prima facie* case has been made, the burden shifts to the party seeking disclosure to articulate a "compelling interest" in obtaining the materials. *See NOW*, 886 F.2d at 1355; *Evergreen Ass'n*, 153 A.D.3d at 100-01; *Matter of Grand Jury Subpoenas for Locals 17, 135, 237, and 608*, 72 N.Y.2d 307, 312-14 (1988).

A. Compelled Production of the Responsive Materials Will Cause Serious Harm to Avaaz and Its Members' First Amendment Rights

Avaaz easily meets its light burden to show that producing the Responsive Materials to Monsanto will chill protected expressive and associational activity. This is true for both the organization itself and for its members.

1. Disclosure of Internal Documents Will Chill Avaaz's Advocacy

Courts have long recognized that forcing a political advocacy organization like Avaaz to disclose its internal communications and deliberations about strategy—whether to its political opponents or, in some cases, even to government investigators—will discourage the exercise of First Amendment rights. For instance, in *AFL-CIO v. FEC*, a labor union and the Democratic National Committee challenged the Federal Election Commission's requirement that they publicly disclose internal strategic documents in an enforcement proceeding. They argued that "disclosing detailed descriptions of training programs, member mobilization campaigns, polling

data, and state-by-state strategies will directly frustrate [their] ability to pursue their political goals effectively by revealing to their opponents activities, strategies, and tactics [they] pursued in subsequent elections and will likely follow in the future." 333 F.3d at 176-77. The D.C. Circuit agreed, holding that compelled public disclosure of "an association's confidential internal materials . . . intrudes on the 'privacy of association and belief guaranteed by the First Amendment,' as well as seriously interferes with internal group operations and effectiveness." *Id.* at 177-78 (citation omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)).

Perry v. Schwarzenegger, a Ninth Circuit decision, is to the same effect. In *Perry*, proponents of a ballot initiative banning gay marriage challenged a document request requiring them to produce internal campaign communications to plaintiffs challenging the ban. The Ninth Circuit had "little difficulty concluding that disclosure of internal campaign communications *can* have [a deterrent] effect on the exercise of protected activities," for at least two reasons. 591 F.3d at 1162. First, "the disclosure of such information can have a deterrent effect on participation in campaigns." *Id.* And second, "disclosure of internal campaign information can have a deterrent effect on the free flow of information within campaigns. Implicit in the right to associate with others to advance one's shared political beliefs is the *right to exchange ideas and formulate strategy and messages, and to do so in private.*" *Id.* (emphasis added); *see also In re Motor Fuel Temp. Sales Practices Litig.*, 641 F.3d at 481 ("[T]he First Amendment privilege applies to the district court's discovery order, which requires trade groups and their members to disclose to a private party their communications regarding strategy for lobbying . . . .").

In this special proceeding, Avaaz presents substantial evidence that even the prospect of forcing it to disclose the Responsive Materials to Monsanto has had and will have *both* forms of deleterious impact. It has inhibited and will inhibit communications within the organization,

thereby slowing and rendering less effective Avaaz's speech, petitioning, and other political advocacy. And it has deterred and will deter people from participating in Avaaz's political advocacy efforts at all. Both impacts constitute classic First Amendment "chill."

The very nature of the Responsive Materials ensures that "chill" is certain to occur. *First*, the Responsive Materials include plans for future advocacy efforts in ongoing campaigns concerning Monsanto. If Avaaz is forced to disclose these to Monsanto, Avaaz will be less likely to undertake those efforts and, if undertaken, they will be less likely to succeed. Ruby-Sachs Aff. ¶ 67. *Second*, the disclosure of internal deliberations to Monsanto will make Avaaz staff members less candid and more careful about proposing creative ideas. *Id.* ¶ 68. *Third*, disclosing Avaaz's candid assessments of where public officials stand on the issues and how they could be swayed to support Avaaz's position will hurt its ability to engage with public officials in the future. *Id.* ¶ 69. *Fourth*, disclosing Avaaz members' proposals and answers to questions about organizational priorities will hurt Avaaz's ability to obtain a clear mandate from its members to act on their behalf. *Id.* ¶ 70.

These injuries are not speculative or hypothetical. They are happening right now. Ms. Ruby-Sachs has instructed Avaaz's staff not to put politically sensitive communications about Monsanto in writing unless absolutely necessary, lest they be divulged to Monsanto. *Id.* ¶ 71. And a large number of staff members have expressed concern about communicating in writing about Monsanto with other staff members or with partner organizations. *Id.* ¶ 73. At a global, decentralized organization like Avaaz that conducts most of its work online, not communicating in writing about Monsanto can mean not planning new advocacy efforts concerning Monsanto, not refining existing efforts, and not adjusting tactics. *Id.* While Avaaz is a hardy organization that continues its important work and will not be deterred from its mission, an atmosphere of

fear—fear that Monsanto will get every document—nevertheless exists within the organization that has undermined the robust give-and-take about Monsanto that is central to its work. *Id.*

The party to whom such information would be disclosed—Monsanto, the very object of Avaaz's intense political advocacy efforts—heightens the negative impact of disclosure. On the issues where Avaaz's perspective and Monsanto's diverge, the two entities are political adversaries. Turning over Avaaz's plans and thought processes, its records and methodologies, its organizational structures and quirks would both unfairly empower Monsanto and profoundly undermine Avaaz's ability to effectively advocate against the company. *See Local 1814, Int'l Longshoremen's Ass'n v. Waterfront Comm'n of N.Y. Harbor*, 667 F.2d 267, 270-72 (2d Cir. 1981).

The evidence submitted here far surpasses what is required for a *prima facie* showing of First Amendment chill under extant case law. In *Perry*, for example, the referendum backers satisfied their burden by submitting affidavits from participants explaining that the disclosure of their emails would change the way they communicated in the future. *See* 591 F.3d at 1163. Similarly, in *AFL-CIO*, the organizations' general averments that disclosing their strategies to their adversaries would frustrate their pursuit of their political goals were enough to make a *prima facie* case. *See* 333 F.3d at 177. The instant record contains evidence of both such forms of "chill" and more, namely the highly negative and genuinely frightened reaction of hundreds of Avaaz's members reported to Avaaz in real time.

2. Disclosure of Member Information Will Discourage Member Association and Participation

Avaaz also separately makes a *prima facie* showing that forced disclosure of the Responsive Materials will harm the associational rights of its members. The Responsive Materials include members' names, email addresses, mailing addresses, history of donations to

Monsanto-related campaigns, suggested campaign ideas about Monsanto, and responses to Avaaz's poll questions about Monsanto. Ruby-Sachs Aff. ¶¶ 49, 54, 78. Many Avaaz members who participate actively in the organization's Monsanto-related campaigns do so because they believe Monsanto is untrustworthy and unethical, and indeed that its practices are dangerous. *See id.* ¶ 76. As some of these members are no doubt aware, Monsanto has a long and well-documented history of investigating people who have opposed its business practices, in a manner that the targets of those investigations have sometimes considered to be harassing. *See, e.g.*, Celli Aff. Exs. F, G. Giving Monsanto access to members' personal information would be a grave breach of their trust in Avaaz and would expose them to the possibility of retaliation. *See* Ruby-Sachs Aff. ¶ 78-79. Many of these members also reside in the European Union and other jurisdictions with much stronger privacy laws that may limit or even forbid the release of this information. *See id.* ¶ 80.

Here, again, Avaaz's concerns about fears among the rank-and-file membership are not theoretical; they are backed by hard evidence from Avaaz members themselves in the United States and around the world. In the week since Avaaz informed its membership of the Subpoena, approximately 200 members have written directly to the organization expressing concern, even alarm, that their private information—including their political interests, donation history, and email addresses—could end up in the hands of Monsanto. *Id.* Some Avaaz members even quit the organization when they learned of the Subpoena. *Id.* ¶ 81.

To give just a few examples of these sentiments, consider the following messages:

- An Avaaz member from Virginia wrote: "I will not sign any more of your petitions. You have scared me with this subpoena email. If I . . . knew this could [have] happened ahead of time I would [have] never signed. Don't give the[m] my information please. You should inform your supporters this is a possibility."

- A member from the United Kingdom wrote: "I have just had the email about the Monsanto subpoena. In it you suggested they might be able to request our personal details. When I joined Avaaz I thought my details would be safe. I am not happy that they might get hold of them and I'm concerned about what they could do with them if they win. Why are my details not protected?"

- A member from France wrote: "Following your message regarding the legal injunction, I ask you to delete any information about me in your possession (servers and others)."

- A member from Austria wrote: "This is just me being concerned on how the average user can be affected by this? There was something about handing over private information. What exactly could they do to someone who signed a petition, let's say. I am simply worried and curious about that part."

Ruby-Sachs Aff. Ex. B. Such statements, and others like them, are the quintessence of First Amendment "chill."

Avaaz's fears that people will be dissuaded from continued participation if Monsanto gets access to their names, email addresses, home addresses, donation histories, and information about their political views are more than reasonable. The identifying information of participants in political protest movements is "exactly the kind of information the First Amendment is designed to protect." *Int'l Action Ctr. v. United States*, 207 F.R.D. 1, 3 (D.D.C. 2002). "There can be little doubt that such public identification of individuals who never intended their participation in First Amendment activity to thrust them into the harsh glare of the limelight is calculated to chill future political dissent and discourage participation in other protest activity." *Id.* at 3-4; *Int'l Soc'y for Krishna Consciousness, Inc v. Lee*, No. 75-CV-5388, 1985 WL 315, at *9 (S.D.N.Y. 1985) (explaining the "strong interest in maintaining the privacy" of the identities of members of political groups, "particularly when the group's causes are unpopular"). The member comments received to date almost universally reflect this common-sense conclusion.

On these facts, Avaaz has more than satisfied its "light" *prima facie* burden to show harm to its members' associational rights. In *Evergreen Association*, 153 A.D.3d 87, the Appellate

Division, Second Department substantially narrowed a subpoena issued by the Attorney General to avoid infringement on the associational rights of a pro-life pregnancy center and its patients, staff, and volunteers. The pregnancy center "*alleged*" in its petition in the special proceeding that "the subpoena had caused great distress to members of its staff," that it "invaded the privacy of the staff and would dissuade others from volunteering," and that a hospital had cut off access to an ultrasound machine as a result of the subpoena. *Id.* at 94 (emphasis added). The Second Department held that these allegations were a sufficient *prima facie* showing that employees and potential clients would be less likely to associate with the pregnancy center, shifting the burden to the Attorney General to show that the subpoena was substantially related to a compelling interest.[1] *See id.* at 100-01.

Similarly, in *Centro de la Comunidad Hispana*, 954 F. Supp. 2d 127, a local day laborers' center sought a protective order against disclosure of its members' identities to town authorities on First Amendment grounds. It presented evidence that disclosing members' identities would "result in an 'irreparable violation of trust'" with members. *Id.* at 140. It also introduced evidence in the form of newspaper articles that the town and its residents were hostile to day laborers, suggesting the potential for retaliation. *Id.* at 141. The court concluded that "both the law and common sense demonstrate" that a *prima facie* showing had been made. *Id.* Similarly, evidence that a protest organization was subject to surveillance decades ago, coupled with members' belief that the organization might still be being monitored, is sufficient to make a *prima facie* case of chilling members' associational rights because it is "reasonable to believe

[1] The Second Department held that women's health and safety was such an interest, but that it only justified the production of documents pertaining to the provision of medical services. *See Evergreen Ass'n*, 153 A.D.3d at 102-03. Document demands relating to the organization's political speech, its sources of funding, and its internal training materials for non-medical matters were quashed. *See id.*

that potential members would be deterred from joining and current members dissuaded from active participation[] if they thought that their membership . . . would be made public." *Schiller*, 2006 WL 3592547, at *5.

For all of these reasons, Avaaz satisfies its light burden to make a *prima facie* showing that compelled disclosure of the Responsive Materials will harm its or its members' protected First Amendment activities.

B. No Compelling Need Outweighs This Harm

Monsanto will be unable to meet its burden to show a "compelling" need for the Responsive Materials. *NOW*, 886 F.2d at 1355. Indeed, as explained in more detail below, there is no need for the Responsive Materials at all because they are utterly irrelevant to Monsanto's defense in the *Peterson* case. *See infra* § II.

C. The Reporter's Privilege Also Shields Some Responsive Materials

Some of the Responsive Materials, including but not limited to information obtained from confidential sources, are protected by the constitutional and statutory reporter's privilege because they were generated as part of Avaaz's newsgathering and reporting activities.

To protect journalists' ability to freely correct and edit news, without exploitation for private purposes and constant diversion of resources, "the courts in New York and elsewhere, Federal and State, have recognized a reporter's qualified privilege under the First Amendment guarantee of free press and speech." *O'Neill v. Oakgrove Const., Inc.*, 71 N.Y.2d 521, 527 (1988). The privilege "bars coerced disclosure of resource materials . . . which are obtained or otherwise generated in the course of . . . newsgathering activities," unless the party seeking disclosure shows that they are (1) highly material, (2) critical to the claim or defense, and (3) not otherwise available. *Id.* The privilege is *not* limited to materials obtained in confidence. *Id.*

New York's Shield Law additionally provides absolute protection for professional journalists and newscasters against compelled disclosure of "news obtained or received in confidence." N.Y. Civ. Rts. Law § 79-h(b). It protects any entity that qualifies as a "professional medium or agency which has as one of its main functions the dissemination of news to the public." *Id.* § 79-h(a)(6); *see Murray Energy Corp. v. Reorg Research, Inc.*, 152 A.D.3d 445, 446 (1st Dep't 2017). The Shield Law was intended "to grant a broad protection" to journalists and is construed broadly to advance this purpose. *Beach v. Shanley*, 62 N.Y.2d 241, 250 (1984).

Creating and disseminating original content to inform its members is one of Avaaz's principal functions. For more than a decade, it has sent its entire membership of tens of millions of people an average of five emails a month highlighting ongoing campaigns and identifying opportunities for members to take action. Ruby-Sachs Aff. ¶ 11. It also disseminates specific regional or national emails related to local campaigns. *Id.* ¶¶ 11, 62. From 2011 through 2013, Avaaz employed three professional journalists and editors who supervised several other contractors and staff in preparing the Avaaz *Daily Briefing*, a daily online publication that featured original content about the most important stories of the day. *Id.* ¶ 11. At its peak, the *Daily Briefing* generated hundreds of thousands of page views per month. *Id.* Avaaz's advocacy work and communications with its members are deeply informed by research and information gathering—that is, reporting—from confidential sources, including scientists, experts, and government officials. *Id.* ¶ 10.

These activities qualify Avaaz as a news organization entitled to the privilege. The Appellate Division, First Department recently emphasized that protection under the Shield Law should *not* be dependent upon a "fact-intensive inquiry analyzing a publication's number of

subscribers, subscription fees, and the extent to which it allows further dissemination of information." *Murray Energy*, 152 A.D.3d at 371. Rather, the central question is whether the party resisting disclosure regularly publishes content that disseminates information to the public, maintains editorial independence and control, and is not compensated for writing about specific topics. *See id.* at 371; *see also Trump v. O'Brien*, 958 A.2d 85, 93 (N.J. App. Div. 2008) (concluding that author's information gathering for use in biography qualified him for protection under New York Shield Law). Avaaz similarly falls within the constitutional privilege because it is was "engaged in newsgathering with the intent to disseminate information to the public." *Nat'l Med. Care, Inc. v. Home Med. of Am., Inc.*, No. 103030/02, 2002 WL 1461769, at *5 (Sup. Ct. N.Y. Cnty. May 20, 2002) (quotation marks omitted).

The reporter's privilege therefore protects several categories of Responsive Materials. These include, but are not limited to, Avaaz's notes or other records of confidential newsgathering conversations with sources; information it obtained from third parties in its newsgathering capacity, such as reports, data, and studies; notes and records of the research its staff conducted to inform its dissemination of information to the public; and work product associated with its regular newsletters and the *Daily Briefing*. *See* Ruby-Sachs Aff. ¶¶ 11, 49, 54. With respect to information gathered in confidence, the privilege is absolute. *See O'Neill*, 71 N.Y.2d at 527. With respect to other Responsive Materials, the privilege is qualified, but Monsanto will be unable to defeat it: Monsanto cannot show that the materials in question are "highly material" to the *Peterson* case and "critical" to its defense. *Id.* Indeed, the Responsive Materials are not relevant at all.

II. THE RESPONSIVE MATERIALS ARE UTTERLY IRRELEVANT TO MONSANTO'S DEFENSE IN THE *PETERSON* CASE

A subpoena should be quashed when "the futility of the process to uncover anything legitimate is inevitable or obvious," or when "the information sought is utterly irrelevant to any proper inquiry." *Matter of Kapon v. Koch*, 23 N.Y.3d 32, 38 (2014). "However, this broadly stated standard . . . should not serve as an excuse for a court to abdicate its responsibility to determine whether the materials sought are in fact relevant to a legitimate subject of inquiry or to permit the subpoena power to be used as a tool of harassment for the proverbial 'fishing expedition' to ascertain the existence of evidence." *Reuters Ltd. v. Dow Jones Telerate, Inc.*, 231 A.D.2d 337, 341-42 (1st Dep't 1997). "This is of special significance where the subpoena is issued in the context of a civil dispute between private parties . . . ." *Id.* at 342.

Here, the matters addressed on the face of the Subpoena and, more importantly, the Responsive Materials in Avaaz's possession are utterly irrelevant to Monsanto's defense of the *Peterson* case. The Subpoena's astonishing breadth demonstrates that it is, in fact, "the proverbial 'fishing expedition.'" *Id.*

A. As a General Matter, Documents About Civic Advocacy Have No Bearing on the Claims and Defenses in the *Peterson* Case

Monsanto was required to state in the Subpoena "the circumstances or reasons . . . disclosure is sought or required." CPLR 3101(a)(4); *see Matter of Kapon*, 23 N.Y.3d at 39. The *only* stated basis for disclosure in the Subpoena is that "the disclosure is relevant to the defense of [the *Peterson*] action, because it is relevant to the allegations in plaintiffs' Complaint/Petition regarding regulatory assessments outside of the United States in which Avaaz Foundation was involved. *See* Complaint/Petition ¶ 72." Celli Aff. Ex. A at 2-3.

Paragraph 72 of the *Peterson* complaint states, in full:

> Several countries around the world have instituted bans on the sale of Roundup® and other glyphosate-containing herbicides, both before and since IARC first announced its assessment for glyphosate in March 2015, and more countries undoubtedly will follow suit in light of the as the dangers of [*sic*] the use of Roundup® are more widely known. The Netherlands issued a ban on all glyphosate-based herbicides in April 2014, including Roundup®, which takes effect by the end of 2015. In issuing the ban, the Dutch Parliament member who introduced the successful legislation stated: "Agricultural pesticides in user-friendly packaging are sold in abundance to private persons. In garden centers, Roundup® is promoted as harmless, but unsuspecting customers have no idea what the risks of this product are. Especially children are sensitive to toxic substances and should therefore not be exposed to it."

Celli Aff. Ex. B ¶ 72.

That documents may be relevant to a single paragraph in a 36-page pleading does not mean that they are relevant to Monsanto's defense of Peterson and Hall's *claims*. Peterson and Hall bring three claims against Monsanto under Missouri law: defective product design; failure to warn; and negligence.[2] *See id.* ¶¶ 80-134. The first two claims are both strict liability claims. *See* Mo. Rev. Stat. § 537.760. The third claim for negligence requires the plaintiffs to show that Monsanto owed them a duty of reasonable care and breached that duty in the process of bringing Roundup® to market. *See Peters v. Wady Indus., Inc.*, 489 S.W.3d 784, 798 (Mo. 2016).

By itself, the fact that the Netherlands or any other country has banned glyphosate has no bearing on whether glyphosate is a carcinogen or on how Peterson and Hall got cancer. The underlying reasons why the Netherlands banned glyphosate are less relevant still. The internal documents of nongovernmental organizations that lobbied the Netherlands or other countries to ban glyphosate would have even less connection to Peterson and Hall's claims. A vast universe of third-party advocacy surrounds and informs countries' glyphosate policies—including, no doubt, Monsanto's own lobbying, campaign contributions, and public relations work. Nongovernmental advocates like Avaaz channel the interests and concerns of citizens to decision

[2] Peterson and Hall also assert a fraud claim against an advertising agency, Osborn & Barr Communications, Inc., which did not subpoena Avaaz and is not involved in these proceedings.

makers but have no role in the decision-making process itself. EU decision making, in particular, is highly democratic and complex and relies on forging consensus among various European institutions and the 27 member states. *See* Ruby-Sachs Aff. ¶ 29. Citizen advocacy about glyphosate is no more relevant to the *Peterson* case than the lobbying efforts of Mothers Against Drunk Driving would be to a bartender's tort liability under the dram shop law.

B. The Responsive Materials In Avaaz's Possession Are Particularly Irrelevant

Even if *some* documents about foreign countries' bans on glyphosate for use in a tort action in Missouri were somehow deemed relevant, Avaaz's Responsive Materials would not be because their content is utterly irrelevant to Monsanto's defense of Peterson and Hall's legal claims.

Avaaz's internal communications and its communications with its members about its political activities are utterly irrelevant to the *Peterson* case. Avaaz did not do any work on glyphosate until *after* the March 2015 release of the IARC Report, which prompted it to consider a campaign about the issue. *See* Ruby-Sachs Aff. ¶¶ 24, 25, 29. Avaaz is a civic movement, not a medical or scientific organization. *Id.* ¶ 26. Its campaigning and advocacy about glyphosate have relied on the public findings of scientists, government bodies, and regulators—beginning with the IARC Report that it had absolutely no involvement in preparing. *See id.* Why Avaaz chose to plan a particular event at a particular place, or which European official Avaaz chose to discuss glyphosate with at what point in its campaign, are purely matters of Avaaz's political strategy, not Monsanto's liability to Peterson, Hall, or anyone else. Because Monsanto has no knowledge of Avaaz's confidential internal decision making, internal documents concerning Avaaz's campaign strategy and tactics cannot shed any light on whether Monsanto knew or should have known, in the decades before the IARC Report, that glyphosate is dangerous.

Avaaz's advocacy is still more irrelevant because it post-dates the exposure and the injuries alleged in the *Peterson* lawsuit, and therefore cannot shed any light on Monsanto's knowledge or state of mind or the reasonableness of its allegedly tortious conduct. The Subpoena mentions four specific instances of advocacy by Avaaz: a June 2015 meeting with the staff of the European Commissioner for Health and Food safety; an April 11, 2017 letter to the Commissioner; a July 11, 2016 letter to the European Chemicals Agency; and an October 10, 2017 letter to members of the European Parliament. Celli Aff. Ex. A at 8. But Peterson was diagnosed with cancer in May 2015, and Hall was diagnosed in May 2013. Celli Aff. Ex. B ¶¶ 78-79. By the time Avaaz took *any* of the four actions on which the Subpoena is principally focused—or, indeed, any substantive work about glyphosate—both Peterson and Hall had already contracted non-Hodgkin's lymphoma and had already stopped using Roundup®. *See id.* Bans on glyphosate that occurred after the conduct for which Peterson and Hall seek to hold Monsanto liable may be included in the *Peterson* complaint for color and context, but they are irrelevant to the disputed legal issues in the case.

Finally, while the Subpoena calls for the production of virtually all of Avaaz's work product on all of its Monsanto-related campaigns, *see* Ruby-Sachs Aff. ¶¶ 50-54, there is no conceivable reason why Avaaz's work on non-glyphosate matters could be relevant to the *Peterson* case. For instance, the Responsive Materials include Avaaz's communications with local officials in Córdoba, Argentina, about Monsanto's proposed seed factory; its internal strategy deliberations about how to challenge the Bayer-Monsanto merger in Brazil and before the European Union; and its research into European and Guatemalan intellectual property law concerning the patenting of seeds and crops. *See id.* ¶¶ 53-54. None of these has anything to do with glyphosate, much less Peterson's or Hall's alleged injuries.

Monsanto's only reason to seek these materials is an improper desire to dig into the internal workings of a leading political opponent. Accordingly, "the subpoena as it stands [is] unenforceable because the document requests are patently overbroad, burdensome, and oppressive." *Reuters Ltd.*, 231 A.D.2d at 344. While a subpoena "will not be denied enforcement merely because it seeks a large number of documents, *it is clear that everything sought must meet the relevancy standard*." *Id.* (emphasis added); *see also Future Tech. Assocs. v. Special Comm'r of Investigation*, 31 Misc. 3d 1206(A), 2011 WL 1260078, at *5 (Sup. Ct. N.Y. Cnty. 2011) (quashing testimonial subpoenas as "fishing expeditions" where they sought to conduct an "unlimited and general inquisition" into the subpoenaed parties' affairs).

III. THE SUBPOENA IS OVERBROAD AND UNDULY BURDENSOME

The Court has broad discretion to enter a protective order denying or limiting disclosure to prevent "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice." CPLR 3103(a). Complying with Monsanto's exceedingly broad Subpoena would impose an onerous logistical and financial burden on Avaaz that would frustrate its ability to advance its mission.

Avaaz's Deputy Director explains in detail that complying with the Subpoena will impose a "crippling" logistical burden on the organization. Ruby-Sachs Aff. ¶ 66. Producing the Responsive Materials *in part* will require searching more than 100 current and former staff members' email accounts and the Skype chat transcripts on their computer hard drives, and then reviewing a vast body of potentially responsive material for responsiveness and privilege. *Id.* ¶¶ 55-59, 61. And because Avaaz communicates with its members in a carefully targeted fashion in 17 languages, millions of unique emails to members would also be responsive to the Subpoena. *Id.* ¶¶ 62-64. Complying with the Subpoena will require thousands of person-hours of time and hundreds of thousands of dollars, if not more. *Id.* ¶ 60.

The federal court supervising the MDL concerning whether glyphosate causes cancer, *In re Roundup® Products Litigation*, MDL No. 2741 (N.D. Cal.), quashed a third-party subpoena issued by Monsanto on burdensomeness grounds under circumstances far more favorable to Monsanto. In the MDL, Monsanto subpoenaed Texas A&M University for documents relating to the work of a faculty member, Dr. Ivan Rusyn, on the IARC Report. *See* Celli Aff. Ex. H. The subpoena essentially sought all documents in Dr. Rusyn's possession concerning glyphosate. *See id.* The MDL court granted Texas A&M's motion to quash. In doing so, it explained that, while the IARC Report was technically "relevant" to whether glyphosate causes cancer because any testifying expert would need to account for its conclusions, it was not "central" to that issue because it was simply an analysis of existing science rather than a new scientific study. Celli Aff. Ex. C at 2. The MDL court concluded that, even if the documents in Dr. Rusyn's possession had "some relevance," they were "not central enough to the litigation to justify the burden such discovery would place on him and the university." *Id.* at 3.

Avaaz bears a far more distant relationship than Dr. Rusyn does to the underlying scientific dispute—whether glyphosate caused cancer in people who used Roundup®. Unlike Dr. Rusyn, Avaaz did not help prepare the IARC Report. It simply conducted after-the-fact political advocacy *on the basis of* the IARC Report and other publicly available scientific evidence. Nor does Avaaz, unlike Dr. Rusyn, have relevant scientific expertise.

Moreover, the burden of compliance on Avaaz far exceeds the burden of compliance on Texas A&M. Because Avaaz has a long history of campaigning against Monsanto on issues unrelated to glyphosate, the quantity of responsive—but entirely irrelevant—material in Avaaz's possession is far greater. And Texas A&M, a large research university with a $10 billion endowment and its own open records department and legal department, *see* Celli Aff. Exs. H, I,

is far better equipped than Avaaz to absorb the logistical and financial burden of gathering, reviewing, and producing responsive materials.

The MDL court's ruling on Monsanto's third-party subpoena to Texas A&M probably explains why Monsanto chose to subpoena Avaaz in a small action in Missouri instead of the MDL, where Monsanto is defending *dozens* of cases simultaneously. But Monsanto's forum-shopping will yield no benefit, for New York law compels the same conclusion here. As an initial matter, the sheer volume of the Responsive Materials justifies a protective order: Avaaz has millions of emails in its possession about glyphosate alone, and millions more concerning its other Monsanto campaigns. *See* Ruby-Sachs Aff. ¶¶ 64-65; *Brodsky v. New York Yankees*, 26 Misc. 3d 874, 888-89 (Sup. Ct. Albany Cnty. 2009) (quashing subpoena because requiring production of 1.3 million emails with attachments was "simply an unreasonable task").

The Court must also take account of the fact that Avaaz is "a not-for-profit stranger" to Monsanto's dispute with Peterson and Hall. *Reyniak v. Barnstead Int'l*, 27 Misc. 3d 1212(A), 2010 WL 1568424, at *3 (Sup. Ct. N.Y. Cnty. 2010) (granting protective order against disclosure of 30 years' of physician's correspondence and research papers for use in products liability dispute). For example, in *Matter of R.J. Reynolds Tobacco Co.*, 136 Misc. 2d 282 (Sup. Ct. N.Y. Cnty. 1987), the Supreme Court quashed a products liability defendant's third-party subpoenas to Mount Sinai Hospital and the American Cancer Society (ACS) for records relating to a study about the carcinogenic effects of asbestos and tobacco. Mt. Sinai provided evidence that it would take "over 1,000 hours of time" to redact confidential patient information from the responsive materials. *Id.* at 285-86. It also explained that giving a corporation with adverse interests access to an ongoing scientific inquiry could "discourage future scientific endeavors" and interfere with doctors' academic freedom. *Id.* at 287. The Supreme Court found that the

subpoenas "would place an unreasonable burden upon the . . . institutions involved and would unduly disrupt the ongoing research." *Id.* 287-88.

Here again, Avaaz is more removed from the underlying litigation than Mt. Sinai and ACS were and faces a harsher burden than they did. Like Dr. Rusyn, Mt. Sinai and ACS were involved in scientific work about whether the allegedly dangerous product at issue in the case—here, glyphosate; there, asbestos and tobacco—caused cancer. And like Texas A&M, Mt. Sinai and ACS were large institutions better equipped than Avaaz to bear the time and expense of compliance. The products liability defendant that served the subpoenas in *R.J. Reynolds* even offered to cover expenses. *See id.* at 286. If these subpoenas imposed an undue burden, then Monsanto's Subpoena to Avaaz surely does.

CONCLUSION

Monsanto's Subpoena targets a successful adversary with sweeping requests for sensitive internal documents about political advocacy that have no relevance to a personal injury case. Monsanto threatens to chill—indeed, it *wants* to chill—Avaaz and its members' exercise of their First Amendment rights. This Court should not countenance such abuse. The Subpoena should be quashed in its entirety.

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